

# Exhibit A

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 28**

In the Matter of:

**SHAMROCK FOODS COMPANY**

and

**BAKERY, CONFECTIONERY, TOBACCO  
WORKERS, AND GRAIN MILLERS' INT'L  
UNION, LOCAL UNION NO. 232, AFL-  
CIO/CLC**

Case No. 28-CA-150157

**EXCEPTIONS OF RESPONDENT SHAMROCK FOODS  
COMPANY TO THE DECISION OF THE ADMINISTRATIVE  
LAW JUDGE**

March 10, 2016

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In accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), 29 C.F.R. § 102.46, Respondent Shamrock Foods Company (“Shamrock”) excepts to Administrative Law Judge Jeffrey D. Wedekind’s Decision in the above-captioned case, dated February 11, 2016 (“ALJD”) on the following grounds:

1. The ALJ erred in finding that Shamrock violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act<sup>1</sup> in any respect. (ALJD, *passim*).

2. The ALJ erroneously enforced Subpoena No. B-1-NZDQTTZ, issued by the General Counsel on August 25, 2015.<sup>2</sup> (*Id.* at p. 17-18, footnote 29).

3. The ALJ improperly found that Shamrock did not engage in a good faith effort to identify and produce documents responsive to Subpoena No. B-1-NZDQTTZ. (*Id.* at p. 17-18, footnote 29; p. 34, footnote 61).

4. The ALJ erred in sanctioning Shamrock based on its efforts to comply Subpoena Subpoena No. B-1-NZDQTTZ. (*Id.* at p. 17-18, footnote 29; p. 34, footnote 61).

5. The ALJ erroneously precluded Shamrock from cross-examining the General Counsel’s witnesses regarding their personal knowledge of the duties and responsibilities of employees working in the floor captain classification. (*Id.* at p. 17-18, footnote 29; p. 34, footnote 61).

6. The ALJ erroneously held that Shamrock violated Sections 8(a)(1) and 8(a)(3) “substantially as alleged” in the Complaint as amended. (ALJD at p. 1, lines unnumbered; p. 2, lines 1-8).

7. The ALJ’s factual findings are not properly supported to the extent that the ALJ relied on portions of the record other than those cited in the Decision. (*Id.* at p. 2, footnote 3).

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<sup>1</sup> 29 U.S.C. §§ 158(a)(1) and (3). These sections will be referred to herein as “Section 8(a)(1)” and “Section 8(a)(3).”

<sup>2</sup> All dates referenced herein are 2015 unless otherwise noted.

8. The ALJ's blanket statement that he considered "all relevant factors" in resolving credibility issues, without regard to any specific credibility determination, is not sufficient to support his credibility findings, and is not sufficient to provide Shamrock with a proper opportunity to challenge those findings. (*Id.* at p. 2, footnote 3).

9. The ALJ erroneously relied upon Steve Phipps' speculative testimony to find that "word of the union campaign was spreading 'like wildfire' in the warehouse" in January 2015. (*Id.* at p. 3, lines 11-12).

10. The ALJ erroneously found that "more and more employees . . . began attending offsite meetings" after January 2015. (*Id.* at p. 3, lines 12-13).

11. The ALJ erred to the extent that he found merit to the General Counsel's allegation that "unlawful threats and other statements were made at seven large or small group meetings between late January and late April 2015 that were conducted by one of three corporate or local managers: Vice President (VP) of Operations Mark Engdahl, then-Human Resources (HR) Director Natalie Wright, or Phoenix Warehouse Manager Ivan Vaivao." (*Id.* p. 3, lines 21-25).

12. The ALJ erred in finding merit to the General Counsel's Section 8(a)(1) claim that Shamrock Vice President of Operations Mark Engdahl "unlawfully threatened employees at [a January 28<sup>th</sup> town hall] meeting that they would lose benefits if they supported a union" based on Engdahl's alleged statement that "the 'slate is wiped clean' on wages, benefits, and working conditions when collective bargaining begins." (*Id.* at p. 3, lines 31-37; *see also* p. 14, lines 30-31; p. 20, lines 21-22; p. 59, lines 21-22; p. 63, line 21).

13. The ALJ erred in discrediting the testimony of Shamrock witness Natalie Wright based on his incorrect assertion that she "refused to say if unions were discussed at the [January 28<sup>th</sup> town hall] meeting." (*Id.* at p. 4, footnote 5).

14. The ALJ erred in finding that Engdahl “clearly suggested or implied that Shamrock would” reduce employee benefits “by emphasizing, exclusively, what the other named and unnamed employers have intentionally done to reduce employee benefits through collective bargaining.” (*Id.* at p. 5, lines 16-18).

15. The ALJ erred in finding that “Engdahl made no effort at the meeting to dispel or temper that implication by assuring employees that Shamrock would bargain over their benefits in good faith and/or that their benefits might also go up or stay the same through the give and take of bargaining.” (*Id.* at p. 5, lines 23-26).

16. The ALJ erred in finding that “there [was] no record evidence that Engdahl or other managers actually said . . . to all of the warehouse employees [that their benefits could be better, worse, or the same after going through the collective-bargaining process] at any other meeting(s) during the relevant period.” (*Id.* at p. 5, lines 32-33; p. 6, lines 1-4 and footnote 8).

17. The ALJ erred in finding that Vaivao only told employees that their benefits could be better, worse, or the same after going through the collective-bargaining process at a meeting on February 24 “with only 8–10 employees.” (*Id.* at p. 6, lines 4-6).

18. The ALJ erred in concluding that Engdahl’s statements at the January 28<sup>th</sup> town hall meeting violated Section 8(a)(1) on the basis that “[Vaivao], Engdahl, and several other company managers and supervisors committed numerous other unfair labor practices as well.” (*Id.* at p. 6, lines 6-10).

19. The ALJ erred in finding that, “while [Shamrock Warehouse Manager Ivan] Vaivao testified that he said wages could go up or down or stay the same at other small ‘communication’ meetings in February that were conducted by Wright, he acknowledged that the meetings were not about the Union and he only made the statement if one of the employees raised the issue.” (*Id.* at p. 6, footnote 8).

20. The ALJ erred in finding a Section 8(a)(1) violation based on his assumption that “it is likely that employees would have reasonably understood Engdahl’s remarks, not merely as a caution that their benefits could go down, but as an effective threat by a high-level manager that they would go down, if they supported a union.” (*Id.* at p. 6, lines 11-14).

21. The ALJ improperly declined to draw an inference that employees were assured at other meetings that their benefits could be better, worse, or the same after going through the collective-bargaining process based on his erroneous finding that “the record [was] insufficient to establish that the Union contumaciously failed to produce recordings from the other meetings (*i.e.* recordings of meetings other than those made by Phipps or Lerma that were put in evidence by the General Counsel) in response to the Company’s hearing subpoena.” (*Id.* at p. 6, footnote 8).

22. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel’s allegation that “Wright unlawfully solicited complaints and grievances at [a January 28] meeting and promised to remedy them if the employees refrained from union activity.” (*Id.* at p. 6, lines 22-24; p. 8, lines 7-8; *see also* p. 34, lines 15-17; p. 59, lines 24-25; p. 63, lines 23-27).

23. The ALJ erred in holding that Shamrock violated Section 8(a)(1) by soliciting employee grievances based on his conclusion that the employee roundtable meeting conducted by Natalie Wright on January 28 was “the first of any such meeting she had conducted since October 2013.” (*Id.* at p. 6, lines 21-22).

24. The ALJ erred in finding that Shamrock was “concerned about [a Teamsters campaign in Southern California] spreading to the Phoenix warehouse.” (*Id.* at p. 7, lines 26-29).

25. The ALJ erred by relying on a Teamsters campaign at Shamrock’s Phoenix warehouse in 1998 to conclude that Shamrock conducted the January 28, 2015 town hall meeting out of concern that a union organizing campaign was underway. (*Id.* at p. 7, lines 26-29).

26. The ALJ erred in concluding that Shamrock was aware of the Union<sup>3</sup> campaign in the Phoenix warehouse despite his contemporaneous finding that “the campaign was still covert at that time, and there is no direct evidence that the Company knew about it.” (*Id.* at p. 7, lines 30-32).

27. The ALJ erred in concluding that Shamrock “at least suspected” that the Union was conducting a campaign at the Phoenix warehouse based on the fact that it conducted a purportedly “antiunion town hall meeting with all of the warehouse employees . . . shortly after word of the campaign began spreading ‘like wildfire’ through the warehouse.” (*Id.* at p. 7, lines 33-35).

28. The ALJ erred in finding that Shamrock was aware of the Union campaign in the Phoenix warehouse because, according to the ALJ, it conducted an “antiunion” meeting on January 28. (*Id.* at p. 7, lines 35-36).

29. The ALJ erred in finding that the employee roundtables prior to 2015 “were usually held to communicate information to employees, and only sometimes to solicit their feedback.” (*Id.* at p. 7, lines 41-42.)

30. The ALJ erred in discrediting Natalie Wright’s testimony that “that soliciting employee complaints was standard practice at the roundtable meetings.” (*Id.* at p. 7, footnote 9).

31. The ALJ erred in finding that Shamrock had not solicited employee feedback in the 15 months prior to January 2015. (*Id.* at p. 7, lines 42-43).

32. The ALJ erred in finding that the January 28 employee roundtable “represented a significant departure from past practice.” (*Id.* at p. 8, lines 1-2).

33. The ALJ erred in finding that the January 28 roundtable meeting was unlawful on the basis that, according to the ALJ, “it was held immediately after the antiunion town hall meeting, where

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<sup>3</sup> Bakery, Confectionery, Tobacco Workers, And Grain Millers’ Int’l Union, Local Union No. 232, AFL-CIO/CLC is referred to herein as the “Union.”

Engdahl had assured all the warehouse employees that they did not need a union because they could talk directly to the Company and it would try to fix any problems they raised.” (*Id.* at p. 8, lines 2-4).

34. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel’s allegation that “Vaivao unlawfully solicited complaints and grievances at [a February 5] meeting and promised to remedy them if the employees refrained from union activity.” (*Id.* at p. 8, lines 14-15; *see also* p. 9, lines 1-4; p. 34, lines 15-17; p. 59, lines 27-28; p. 63, lines 23-27).

35. The ALJ erred in concluding that the February 5 employee roundtable meeting differed from Shamrock’s prior efforts to collect employee feedback. (*Id.* at p. 8, lines 18-33).

36. The ALJ erred in holding that “Vaivao’s testimony about his role at the February 5 meeting, whether he solicited employee complaints, and whether any complaints were elicited, is clearly contradicted by the audio recording of the meeting.” (*Id.* at p. 8, footnote 12).

37. The ALJ erred in finding a Section 8(a)(1) violation on the basis of the General Counsel’s allegation that “Vaivao . . . unlawfully asked the employees [at a February 24 meeting] to ascertain and disclose the union activities of other employees by asking them to raise their hand to let him know if another employee had contacted them.” (*Id.* at p. 9, lines 23-28; p. 10, lines 22-24; *see also* p. 59, lines 30-31; p. 63, lines 31-32).

38. The ALJ erroneously discredited Vaivao as a witness on the basis of the ALJ’s incorrect assertion that Vaivao denied that “‘union education’ or ‘union prevention’ meetings were held.” (*Id.* at p. 9, footnote 13).

39. The ALJ erred in finding Section 8(a)(1) violations on the basis of the General Counsel’s allegation that “Engdahl . . . unlawfully promised and granted benefits to employees [at an April 29 meeting] by guaranteeing or committing to them that there would not be a layoff during the slow summer season like the previous year; . . . threatened employees with unspecified reprisals by telling them the Union will hurt them and everybody in the future; and informed employees that it



would be futile for them to support the Union by telling them that the Company does not have to agree to anything through collective bargaining.” (*Id.* at p. 12, lines 20-28; *see also* p. 23, lines 27-33; p. 34, lines 17-19; p. 59, lines 33-41; p. 63, lines 26-27, 34, 36).

40. The ALJ erred in holding that “Engdahl’s no-layoff commitment [on April 29] was clearly unlawful” under Section 8(a)(1). (*Id.* at p. 14, line 7; *see also* p. 59, lines 33-35).

41. The ALJ erred in finding that “Engdahl’s statement to employees [on April 29] that supporting the Union ‘will hurt’ them in the future was . . . made in the context of numerous other unfair labor practices.” (*Id.* at p. 14, lines 28-29; *see also* p. 59, lines 37-38; p. 63, line 34).

42. The ALJ erred in finding a Section 8(a)(1) violation based on Engdahl’s statement to employees that “[t]he company doesn’t have to agree to anything, nothing . . . Bargaining can go on forever. It can never end . . . All you have to do is bargain in good faith.” (*Id.* at p. 15, lines 17-20; *see also* p. 59, lines 40-41).

43. The ALJ erred in concluding that, due to “other unfair labor practices, the formal nature of the meeting, and Engdahl’s high-level corporate position, it makes no difference that Engdahl couched the statement and other imparted ‘truths’ as his ‘opinion.’” (*Id.* at p. 15, footnote 24).

44. The ALJ erred in concluding that Shamrock floor captains are “supervisors” under Section 2(11) of the Act based on the testimony of the General Counsel’s witnesses, which was largely unsupported by personal knowledge. (*Id.* at p. 16, lines 4-24, footnote 25; p. 17, lines 5-13, footnote 29; p. 18, lines 1-5).

45. The ALJ erred in prohibiting Shamrock from presenting evidence concerning supervisory status, including his prohibition on cross-examination of the General Counsel’s witnesses and on Shamrock’s presentation of witnesses for direct examination. (*Id.* at p. 17, footnote 29).

46. The ALJ erred in drawing an adverse inference against Shamrock as to the supervisory status of floor captains. (*Id.* at p. 18, footnote 29).

47. The ALJ erred in declining to draw an adverse inference against the General Counsel based on its failure to call floor captains White and Manning as witnesses, despite having them subpoenaed to attend the trial. (*Id.* at p. 18, footnote 29.)

48. The ALJ erred in finding that “there are some factors supporting the General Counsel’s contention that White’s remarks and questions [to employee Steve Phipps on January 25] were coercive.” (*Id.* at p. 19, lines 5-10).<sup>4</sup>

49. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel’s allegation “that, on January 28, shortly after the town hall meeting, Outbound/Shipping Supervisor Myers unlawfully interrogated Wallace about his union sympathies.” (*Id.* at p. 20, lines 3-5; *see also* p. 60, lines 4-5; p. 63, line 38).

50. The ALJ erred in crediting, without explanation, General Counsel witness Thomas Wallace’s version of his conversation with Shamrock supervisor Jake Myers. (*Id.* at p. 20, lines 11-15, footnote 35).

51. The ALJ erred in concluding that “the balance of relevant factors supports the allegation that [Myers’ alleged conversation with Wallace on January 28] was coercive and unlawful.” (*Id.* at p. 20, lines 17-18).

52. The ALJ erred in finding that Myers’ alleged conversation with Wallace on January 28 was coercive based in part on the assertion that Myers “purposefully approached Wallace at his work

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<sup>4</sup> The ALJ ultimately concluded that the General Counsel failed to establish a Section 8(a)(1) violation in regard to this allegation. Accordingly, this exception is asserted only for protective purposes in the event that the General Counsel excepts to the ALJ’s dismissal of this allegation. If the General Counsel does not except to the dismissal, this exception will be withdrawn.

station [on January 28] and questioned him directly about his personal views of the union.” (*Id.* at p. 20, lines 19-20).

53. The ALJ erred in finding that Myers’ alleged conversation with Wallace on January 28 was coercive based in part on the assertion that it occurred after “a high-level corporate official expressed opposition to the union and unlawfully threatened employees with reduced benefits if they supported it.” (*Id.* at p. 20, lines 21-22).

54. The ALJ erred in finding that Myers’ alleged conversation with Wallace on January 28 was coercive based in part on the assertion that Wallace “gave Myers a noncommittal response.” (*Id.* at p. 20, line 23).

55. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel’s allegation that “Floor Captain Manning engaged in surveillance of the employees’ union activities at the local Denny’s restaurant” on January 28. (*Id.* at p. 20, lines 27-28; *see also* p. 60, line 7; p. 63, line 40).

56. The ALJ erred in finding that “Phipps was meeting with small groups of employees at that time [January 28], but only organizing-committee members and employees they were sure supported the Union were invited.” (*Id.* at p. 20, lines 31-33).

57. The ALJ erred in “crediting” the testimony of General Counsel witness Thomas Wallace concerning Manning’s attendance at the January 28 meeting at Denny’s, as Wallace testified that he was not present during any conversations with Manning. (*Id.* at p. 21, footnote 36).

58. The ALJ erred in discrediting Manning’s testimony that he was invited to the January 28 meeting at Denny’s. (*Id.* at p. 21, footnote 37).

59. The ALJ erred in concluding that Manning’s attendance at the January 28 meeting at Denny’s violated Section 8(a)(1) because, according to the ALJ, he did so “without an invitation or

any other legitimate justification to observe employees' union activities during nonworking time.” (*Id.* at p. 21, lines 8-13).

60. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel's allegation that floor captain Manning “unlawfully created the impression of surveillance by telling Phipps [on April 27] . . . that he had better watch his back because the Company was watching him.” (*Id.* at p. 21, lines 17-20; *see also* p. 22, lines 15-17; p. 60, line 9; p. 63, line 42).

61. The ALJ erred in permitting the General Counsel to change its theory of a Section 8(a)(1) violation in regard to floor captain Manning's alleged conversation with General Counsel witness Phipps on April 27. (*Id.* at p. 21, footnote 39).

62. The ALJ erred in finding that Manning told Phipps “just watch yourself, because they [are] watching both of us, so watch your back.” (*Id.* at p. 22, lines 7-8).

63. The ALJ erred in crediting Phipps' version of his alleged April 27 conversation with Manning. (*Id.* at p. 22, footnote 40).

64. The ALJ erred in stating, without any basis or explanation, that “Manning's testimony on other matters was inconsistent and clearly contrary to the record as a whole.” (*Id.* at p. 22, footnote 40).

65. The ALJ erred in finding Section 8(a)(1) violations based on the General Counsel's claim “that, on April 29, a few days after Phipps announced the union campaign in the breakroom, Safety Manager Remblance unlawfully surveilled and interrogated Phipps and another employee while they were on break.” (*Id.* at p. 22, lines 20-22, *see also* p. 23, lines 18-19, 32-33; p. 34, lines 17-19; p. 60, lines 11-13; p. 63, lines 38-40).

66. The ALJ erred in finding that Shamrock supervisor Remblance was “monitor[ing] [Phipps'] break time” on April 29. (*Id.* at p. 23, line 14).

67. The ALJ erred in finding Remblance's alleged conversation with Phipps on April 29 was coercive based in part on the assertion that "there is no apparent reason in the record why Remblance would have [monitored Phipps' break time on April 29] other than Phipps' recent announcement about the union campaign in the breakroom." (*Id.* at p. 23, lines 14-16).

68. The ALJ erred in finding Remblance's alleged conversation with Phipps on April 29 was coercive based in part on the assertion that "other company managers and supervisors likewise took a number of other, unlawful actions to monitor and interfere with the union campaign." (*Id.* at p. 23, lines 17-18).

69. The ALJ erred in finding Remblance's alleged conversation with Phipps on April 29 was coercive based in part on the assertion that it occurred "just 2 days after Phipps' announcement, and a few hours after the antiunion communication meeting where Operations VP Engdahl made several unlawful statements to Phipps and other first-shift senior employees—and the unlawful context discussed above." (*Id.* at p. 23, lines 27-33).

70. The ALJ erred in finding a Section 8(a)(1) violation by concluding that "it is likely that Remblance's question would have reasonably tended to chill employees in the exercise of their union activity." (*Id.* at p. 23, lines 30-32).

71. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel's allegation that "on May 1, Inbound/Receiving Supervisor Garcia unlawfully engaged in surveillance and created the impression of surveillance by searching Lerma's forklift for union authorization cards and subsequently telling Lerma that he knew that Lerma had passed out a card in the breakroom and that he had searched Lerma's forklift to find union cards." (*Id.* at p. 24, lines 2-5; *see also* p. 28, lines 37-39; p. 44, lines 26-27; p. 60, lines 15-16; p. 63, lines 40-42).

72. The ALJ erred in crediting the version of events provided by General Counsel witness Mario Lerma regarding his interactions with Shamrock supervisor David Garcia on May 1 over the testimony of Garcia. (*Id.* at p. 24, lines 8-34, footnote 46).

73. The ALJ erred in finding that Shamrock supervisor Garcia engaged in coercive conduct in violation of Section 8(a)(1) based on the assertion that there is no “contention or evidence that the Company had a non-discriminatory policy and practice of searching forklifts or clipboards for nonwork related items.” (*Id.* at p. 25, lines 2-5).

74. The ALJ erred in finding a Section 8(a)(1) violation on the basis of the General Counsel’s allegation that “on May 5, Operations VP Engdahl and Warehouse Manager Vaivao called Lerma up to the office and made various statements to him that unlawfully . . . promulgated an overbroad and discriminatory rule prohibiting him and other union supporters from heckling or insulting employees, and threatened him with unspecified reprisals for doing so.” (*Id.* at p. 25, lines 15-19; *see also* p. 27, lines 18-28; p. 28, lines 13-14, 39-40; p. 44, line 46-48; p. 60, lines 18-21; p. 63, line 34, p. 64, lines 1-2; p. 65, lines 4-7).

75. The ALJ erred in that his findings concerning Engdahl and Vaivao’s May 5 meeting with Lerma exclude any consideration (or mention) of the fact that Lerma engaged in an unprotected slowdown to coerce his coworkers into signing union authorization cards. (*Id.* at pp. 25-29).

76. The ALJ erred in finding that Engdahl and Vaivao’s May 5 meeting with Lerma violated Section 8(a)(1) on the basis that Engdahl “did not cite or refer Lerma to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.” (*Id.* at p. 27, lines 33-34).

77. The ALJ erred in finding that “[t]here is . . . no real dispute that Engdahl promulgated the rule [against heckling and harassment] in response to union activity.” (*Id.* at p. 27, lines 36-37).

78. The ALJ erred in finding that “there is no dispute that [Engdahl and Vaivao] were referring to Lerma’s prounion opinions and activities [during the May 5 meeting], and that everyone in the room understood this.” (*Id.* at p. 28, lines 1-2; *see also* p. 30, lines 12-13).

79. The ALJ erred in holding that Shamrock failed “to demonstrate that the new rule was actually motivated by legitimate workplace concerns apart from the union campaign.” (*Id.* at p. 28, lines 4-6).

80. The ALJ erred in holding that Engdahl and Vaivao’s testimony “that employees complained to them about Lerma and other union supporters throwing pens at them after they declined to sign a card” was hearsay. (*Id.* at p. 28, lines 7-8, footnote 51).

81. The ALJ erred in disregarding Lerma’s failure to deny the misconduct allegations that Engdahl and Vaivao explained to him during their meeting on May 5. (*Id.* at p. 28, footnote 51).

82. The ALJ erred in holding that the “rule” against heckling or insulting coworkers that was purportedly promulgated during Engdahl and Vaivao’s May 5 meeting with Lerma was unlawful based in part on the assertion that “Lerma credibly testified that he did not engage in such conduct . . . and none of the complaining employees were called to contradict him.” (*Id.* at p. 28, lines 9-11).

83. The ALJ erred in holding that the “rule” against heckling or insulting coworkers that was purportedly promulgated during Engdahl and Vaivao’s May 5 meeting with Lerma was unlawful based in part on the fact that the complaints mentioned by Engdahl and Vaivao were not documented or investigated. (*Id.* at p. 28, lines 11-12).

84. The ALJ erred in holding that the “rule” against heckling or insulting coworkers that was purportedly promulgated during Engdahl and Vaivao’s May 5 meeting with Lerma was unlawful based in part on the fact that “Engdahl announced the rule at a time when employees were, in fact, reportedly complaining about being approached by union supporters.” (*Id.* at p. 28, lines 34-35).

85. The ALJ erred in holding that the “rule” against heckling or insulting coworkers that was purportedly promulgated during Engdahl and Vaivao’s May 5 meeting with Lerma was unlawful based in part on the fact that “Vaivao had reported [the receipt of employee complaints] to Lerma and other employees at the March 26 union prevention meeting.” (*Id.* at p. 28, lines 35-36).

86. The ALJ erred in holding that the “rule” against heckling or insulting coworkers that was purportedly promulgated during Engdahl and Vaivao’s May 5 meeting with Lerma was unlawful based in part on the allegation that, “just days before the May 5 meeting, Lerma’s immediate supervisor, Garcia, unlawfully searched his forklift for union cards simply because he had been seen handing a card to an employee in the breakroom.” (*Id.* at p. 28, lines 37-39).

87. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel’s allegation that Shamrock President/CEO Kent McClelland’s May 8 letter to warehouse employees “unlawfully promulgated an overbroad and discriminatory rule that requested employees to report, and threatened to legally prosecute, anyone who violated it.” (*Id.* at p. 29, lines 13-17; *see also* p. 30, lines 30-31; p. 31, lines 10-12; p. 60, lines 23-26; p. 64, lines 1-9; p. 65, lines 9-11).

88. The ALJ erred in finding that Kent McClelland’s May 8 letter was not consistent with any existing Company rule simply because “McClelland did not cite or refer employees to any existing rule prohibiting such conduct.” (*Id.* at p. 30, lines 7-8).

89. The ALJ erred in finding that “the Company does not contend that there was any [prior] rule” prohibiting the conduct described in McClelland’s May 8 letter. (*Id.* at p. 30, line 8, footnote 53).

90. The ALJ erred in finding that it is “clear that [McClelland’s May 8] letter was sent in response to union activity.” (*Id.* at p. 30, line 10).



91. The ALJ erred in stating that McClelland's May 8 letter was coercive under Section 8(a)(1) on the basis that "McClelland sent the letter to all the warehouse employees just 3 days later after [Engdahl and Vaivao's May 5 meeting with Lerma]." (*Id.* at p. 30, lines 13-14).

92. The ALJ erred in finding that the "McClelland's testimony regarding how he came to send the letter is entirely unbelievable." (*Id.* at p. 30, lines 18-19).

93. The ALJ erred in concluding that "[i]t is inherently unlikely in these circumstances that [McClelland] would not have asked or been told, at least in general terms, what the alleged threatening behavior was about, before sending the letter." (*Id.* at p. 30, lines 25-27).

94. The ALJ erred in holding that "it was incumbent on the Company to show that McClelland's new rule was actually motivated by legitimate workplace concerns apart from the union campaign." (*Id.* at p. 30, lines 29-31).

95. The ALJ erred in holding that Shamrock failed to establish that the rule allegedly promulgated in McClelland's May 8 letter was motivated by legitimate workplace concerns apart from the union campaign." (*Id.* at p. 30, line 31).

96. The ALJ erred in holding that McClelland's May 8 letter violated Section 8(a)(1) "by requesting employees to 'promptly report' to the Company if they were 'the victim of such 15 behavior, in any way, shape, or form, however minor,' and by threatening to 'refer the matter to law enforcement for prosecution to the fullest extent of the law' if the Company decided the complaint had merit." (*Id.* at p. 31, lines 14-18; *see also* p. 64, lines 7-9).

97. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel's allegation that Shamrock supervisor Karen Garzon "unlawfully took union flyers away from and interrogated two of those employees in the breakroom." (*Id.* at p. 31, lines 26-27; *see also* p. 32, lines 1-3; p. 60, lines 28-30; p. 63, lines 38, 44).

98. The ALJ erred in finding that Garzon, after removing Union flyers from a break room table, said to two employees, ““Well, you guys don’t want these, do you?” (*Id.* at p. 32, lines 1-2, 22-23; *see also* p. 32, lines 1-3).

99. The ALJ erred in characterizing Garzon’s testimony as acknowledging that she “took” a Union flyer from an employee “because it was in English and the employee asked her to translate it in Spanish for her.” (*Id.* at p. 32, footnote 57).

100. The ALJ erred in stating that G.C. Ex. 24 “shows Garzon entering the breakroom, walking directly to the counter, picking up the union flyers, and immediately walking out with them.” (*Id.* at p. 32, lines 10-11).<sup>5</sup>

101. The ALJ erred in finding that there “is strong evidence that Garzon went into the breakroom solely to remove the union flyers.” (*Id.* at p. 33, footnote 59).<sup>6</sup>

102. The ALJ erred in “discredit[ing] Garzon’s testimony that she did not go there on that occasion to look for or remove the flyers, and that she was just checking the entire breakroom as usual to make sure it was clean.” (*Id.* at p. 33, footnote 59).<sup>7</sup>

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<sup>5</sup> The ALJ ultimately concluded that the General Counsel failed to establish a Section 8(a)(1) violation in regard to this allegation. Accordingly, this exception is asserted only for protective purposes in the event that the General Counsel excepts to the ALJ’s dismissal of this allegation. If the General Counsel does not except to the dismissal, this exception will be withdrawn.

<sup>6</sup> The ALJ ultimately concluded that the General Counsel failed to establish a Section 8(a)(1) violation in regard to this allegation. Accordingly, this exception is asserted only for protective purposes in the event that the General Counsel excepts to the ALJ’s dismissal of this allegation. If the General Counsel does not except to the dismissal, this exception will be withdrawn.

<sup>7</sup> The ALJ ultimately concluded that the General Counsel failed to establish a Section 8(a)(1) violation in regard to this allegation. Accordingly, this exception is asserted only for protective purposes in the event that the General Counsel excepts to the ALJ’s dismissal of this allegation. If the General Counsel does not except to the dismissal, this exception will be withdrawn.

103. The ALJ erred in finding a Section 8(a)(1) violation based on the General Counsel's allegation that on or "about May 29, the Company unlawfully gave a wage increase to some of the warehouse employees to dissuade them from supporting or voting for the Union." (*Id.* at p. 34, lines 1-3; *see also* p. 35, line 37; p. 60, lines 32-33; p. 63, line 29).

104. The ALJ erred in finding that "[t]he evidence strongly supports an inference that [dissuading employees from supporting the Union] was the Company's motive for granting or announcing the May wage increases." (*Id.* at p. 34, lines 13-14).

105. The ALJ erred in finding that the May wage increases were unlawful based in part on his assertion that "HR Director Wright and Warehouse Manager Vaivao had unlawfully solicited employee complaints regarding their wages at the roundtable and communication meetings on January 28 and February 5." (*Id.* at p. 34, lines 15-17).

106. The ALJ erred in finding that the May wage increases were unlawful based in part on his assertion that "at the recent communication meeting on April 29, Operations VP Engdahl had specifically reminded employees, after making various unlawful promises and threats, that it was 'the company' that pays wages, 'not the union.'" (*Id.* at p. 34, lines 17-19).

107. The ALJ erred in finding that the May wage increases were "extraordinary and unprecedented." (*Id.* at p. 34, lines 20-21).

108. The ALJ erred in holding that the May 29 wage increases "fit well with the Company's other unlawful antiunion conduct." (*Id.* at p. 34, lines 22-23).

109. The ALJ erred in holding that "the Company's fail[ed] to make a good-faith effort to timely comply with the General Counsel's subpoena request for the relevant payroll records." (*Id.* at p. 34, footnote 61).

110. The ALJ erred in prohibiting Shamrock from presenting evidence through direct or cross-examination concerning the reasons for the May wage increases. (*Id.* at p. 34, footnote 61).

111. The ALJ erred in relying on the testimony of General Counsel witnesses Phipps and Lerma concerning the May wage increases, particularly in light of his refusal to allow Shamrock to cross-examine them concerning the basis for their asserted personal knowledge. (*Id.* at p. 34, footnote 61.)

112. The ALJ erred in characterizing Shamrock's argument as an assertion "that the wage increase cannot be found unlawful because no election petition was pending at the time." (*Id.* at p. 35, line 2).

113. The ALJ erred in finding that the May wage increases were unlawful on the basis of his assertion that there was no "evidence or contention that the Company had reason to believe that the campaign excluded warehouse workers in the will call, returns, sanitation, and thrower positions." (*Id.* at p. 35, lines 8-11).

114. The ALJ erred in finding that there was "no evidence that the union campaign was not still active during and after May 2015," particularly in light of the fact that he prohibited Shamrock from cross-examining General Counsel witnesses on the extent of the campaign. (*Id.* at p. 35, lines 14-15).

115. The ALJ erred in holding that the May wage increases violated Section 8(a)(1) based on his conclusion that "there was no reasonable basis for the Company to conclude that the union campaign was dormant at the time of the wage increases." (*Id.* at p. 35, lines 17-18).

116. The ALJ erred in finding that the May 21 affidavit of General Counsel witness Steve Phipps was insufficient to establish that the Union campaign was dormant. (*Id.* at p. 35, lines 22-30).

117. The ALJ erred in holding that Shamrock was precluded from relying on Phipps' May 21 affidavit on the basis that "there is no record evidence or contention that the Company was provided a copy of Phipps' affidavit before it granted the wage increases." (*Id.* at p. 35, lines 31-32).

118. The ALJ erred in finding violations of Sections 8(a)(1) and (3) based on the General Counsel's claim that Shamrock "discharge[ed] Wallace on April 6 because he complained at a March 31 company meeting about the Company's health benefits and/or because he supported the Union, and to discourage other employees from engaging in such activities." (*Id.* at p. 36, lines 5-7; *see also* p. 14, line 32; p. 15, lines 1-2; p. 42, lines 28-29; p. 61, lines 36-39; p. 63, lines 18-19; p. 64, lines 40-43).

119. The ALJ erred in characterizing Wallace as "one of the more active union supporters." (*Id.* at p. 14, line 32; p. 15 lines 1-2).

120. The ALJ erred in finding violations of Sections 8(a)(1) and (3) based on the General Counsel's claim that Shamrock "present[ed] a separation agreement to Wallace at the time of his discharge that included certain overbroad provisions." (*Id.* at p. 36, lines 7-10; *see also* p. 63, lines 14-16; p. 65, line 13-17).

121. The ALJ erred in crediting Wallace's testimony concerning his April 6 termination meeting with Vaivao and Shamrock Human Resources representative James Allen. (*Id.* at p. 38, lines 8-23, footnote 68).

122. The ALJ erred in finding that Wallace's testimony concerning his April 6 meeting with Vaivao and Allen was consistent with the affidavit he gave to the General Counsel. (*Id.* at p. 38, footnote 68).

123. The ALJ erred in finding that Shamrock Senior Vice-President of Human Resources Robert Beake told Kent and Norman McClelland about Wallace's conduct and/or discharge simply because "there is no reason to believe Beake would not have spoken to one or both of the McClellands about the meeting." (*Id.* at p. 38, footnote 68).

124. The ALJ erred in finding that "Beake did not deny reporting to the McClellands about the meeting." (*Id.* at p. 38, footnote 68).

125. The ALJ erred in finding that “HR Vice President Daniels’ testimony that he alone made the discharge decision without talking to anyone is wholly unbelievable.” (*Id.* at p. 38, footnote 68).

126. The ALJ erred in holding that “Vaivao was a particularly unreliable witness” on the basis of the ALJ’s claim that Vaivao “testified that Wallace was the only one who left the meeting early.” (*Id.* at p. 38, footnote 68).

127. The ALJ erred in concluding that Wallace did not belligerently leave the March 31 meeting on the basis that “there was no sound of any disturbance” in the audio recording of the meeting. (*Id.* at p. 39, footnote 68).

128. The ALJ erred in finding that Wallace did not make an improper gesture as he left the meeting based on his assertion that Shamrock’s position statement did not specifically mention the gesture. (*Id.* at p. 39, footnote 68).

129. The ALJ erred in holding that the General Counsel can satisfy the employer knowledge element of the *Wright Line*<sup>8</sup> test by establishing that “the employer knew [of the protected activity], or the employer believed or suspected that the employee engaged in or was likely to engage in such activity.” (*Id.* at p. 39, lines 14-16).

130. The ALJ erred in holding that “Vaivao specifically stated at the termination meeting that Wallace was being fired for complaining to Beake about the Company’s healthcare plan at the meeting.” (*Id.* at p. 39, lines 32-34).

131. The ALJ erred in holding that “it is certainly a reasonable inference that the Company knew or suspected [Wallace’s support of the Union] given the nature of Wallace’s questions at the January 28 and March 31 meetings and Vaivao’s statements at the March 26 union prevention meeting

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<sup>8</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), 10 cert. denied 455 U.S. 989 (1982).

that the Company knew ‘exactly’ which ‘disgruntled’ employees supported the Union and attended union meetings.” (*Id.* at p. 40, lines 2-6, footnote 70).

132. The ALJ erred in holding that “the Company’s strong animus toward union supporters is well established by the Company’s numerous unfair labor practices and the record as a whole.” (*Id.* at p. 40, lines 6-7).

133. The ALJ erred in drawing an adverse inference based on his assertion that the Company gave “shifting reasons” for Wallace’s discharge. (*Id.* at p. 40, lines 18-27, p. 40, lines 1-4).

134. The ALJ erred in drawing an adverse inference based on his assertion that Shamrock offered false reasons for Wallace’s discharge. (*Id.* at p. 41, lines 6-13).

135. The ALJ erred in characterizing the reason for Wallace’s discharge (i.e., making an improper gesture while leaving the March 31 meeting early) as “at best a distortion or exaggeration of the facts.” (*Id.* at p. 41, line 10).

136. The ALJ erred in concluding that the March 31 meeting ended when Shamrock’s Senior Vice President of Human Resources Robert Beake asked for questions from employees. (*Id.* at p. 41, lines 10-14).

137. The ALJ erred in holding that Shamrock’s Vice President of Human Resources Vince Daniels’ testimony that he made the decision to discharge Wallace alone was “inherently unbelievable.” (*Id.* at p. 41, lines 27-33).

138. The ALJ erred in finding that Daniels’ testimony was “inconsistent with other evidence” on the basis of the ALJ’s erroneous finding that “Vaivao told Wallace that the McClellands had made the decision.” (*Id.* at p. 41, line 33).

139. The ALJ erred in finding that the purportedly “confined and constricted manner” in which Daniels made the decision to discharge Wallace was “strong evidence of unlawful motive.” (*Id.* at p. 42, lines 6-21).

140. The ALJ erred in inferring an unlawful motive on the part of Daniels based on the fact that Daniels did not ask Wallace why he left the meeting. (*Id.* at p. 42, lines 11-16).

141. The ALJ erred in holding that Shamrock “failed to satisfy its burden of showing that it would have taken the same action anyway, regardless of Wallace’s protected conduct.” (*Id.* at p. 42, lines 23-26).

142. The ALJ erred in finding, based on his erroneous crediting of Wallace’s testimony, that “Beake and/or other managers met with or otherwise reported to the McClellands between March 31 and April 6 what transpired at the meeting, and that the McClellands directed that Wallace be discharged.” (*Id.* at p. 42, footnote 74).

143. The ALJ erred in finding a Section 8(a)(1) violation based on paragraph 10 of the Separation Agreement presented to Wallace on April 6 that would have required Wallace (if he had signed the Agreement) to keep Shamrock’s business information confidential. (*Id.* at p. 42, lines 33-34; p. 43, lines 1-14, 28-41; *see also* p. 61, lines 31-34; p. 64, lines 14-16).

144. The ALJ erred in finding a Section 8(a)(1) violation based on paragraph 12 of the Separation Agreement presented to Wallace on April 6 that would have prohibited Wallace (if he had signed the Agreement) from disclosing Shamrock’s confidential information. (*Id.* at p. 42, lines 33-34; p. 43, lines 18-22, 28-41; *see also* p. 61, lines 31-34; p. 64, lines 14-16).

145. The ALJ erred in finding a Section 8(a)(1) violation based on paragraph 13 of the Separation Agreement presented to Wallace on April 6 that would have prohibited Wallace (if he had signed the Agreement) from making disparaging remarks or engaging in other conduct detrimental to Shamrock’s business. (*Id.* at p. 42, lines 33-34; p. 43, lines 24-26, 43-46; *see also* p. 61, lines 31-34; p. 64, lines 14-16).



146. The ALJ erred in holding that “it makes no difference that the foregoing provisions were contained in a separation agreement and that Wallace refused to sign it.” (*Id.* at p. 44, lines 15-16).

147. The ALJ erred in finding violations of Section 8(a)(1) and (3) violations based on the General Counsel’s allegation that “Engdahl and Vaivao . . . unlawfully disciplined Lerma at the May 5 meeting because of his protected union activities, and to discourage him and other employees from engaging in such activities.” (*Id.* at p. 45, lines 1-3, 35; *see also* p. 61, lines 41-44; p. 63, lines 18-19; p. 64, line 45 through p. 65, line 2).

148. The ALJ erred in finding that “a preponderance of the evidence establishes that Lerma was, in fact, disciplined at the [May 5] meeting.” (*Id.* at p. 45, lines 6-7).

149. The ALJ erred in holding that Lerma was disciplined at the May 5 meeting based on Vaivao’s reference to the fact that he and Engdahl were only intending to “counsel” Lerma. (*Id.* at p. 45, lines 8-10).

150. The ALJ erred in finding that Lerma was disciplined at the May 5 meeting based on “Vaivao’s statement at the meeting that Lerma could get in ‘deeper trouble’ if employees continued to complain about him.” (*Id.* at p. 45, lines 10-11).

151. The ALJ erred in finding that Lerma was disciplined at the May 5 meeting based on Engdahl’s purportedly “veiled warning that Lerma would be terminated, the very last step in the progressive disciplinary process, the next time.” (*Id.* at p. 45, lines 14-16).

152. The ALJ erred in finding that the General Counsel established animus in regard to Engdahl and Vaivao’s May 5 meeting with Lerma on the basis of Shamrock’s alleged “numerous other violations, including Supervisor Garcia’s unlawful search for union cards on Lerma’s clipboard just a few days before the May 5 meeting.” (*Id.* at p. 45, lines 25-27).

153. The ALJ erred in concluding that Lerma was unlawfully disciplined at the May 5 meeting based on the fact that Engdahl and Lerma did not “investigate the alleged complaints about Lerma’s ‘heckling,’ ‘insulting,’ and ‘potential slowdown[s].’” (*Id.* at p. 45, lines 28-32).

154. The ALJ erred in holding that the purported discipline administered to Lerma violated Section 8(a)(1) despite his finding that the General Counsel abandoned that allegation. (*Id.* at p. 45, footnote 78; *see also* p. 61, lines 41-42).

155. The ALJ erred in finding a Section 8(a)(1) violation based on Shamrock’s rule entitled “Protecting the Company’s Confidential Information.” (*Id.* at p. 46, lines 8-39; p. 47, lines 1-7; *see also* p. 60, lines 38-41; p. 64, lines 11-12; p. 65, lines 19-22; p. 66, lines 1-5).

156. The ALJ erred in finding that the General Counsel’s allegation that the Company rule entitled “Requests by Regulatory Authorities” violates Section 8(a)(1) was “well supported by Board precedent” if the rule is read in isolation. (*Id.* at p. 47, lines 26-27).<sup>9</sup>

157. The ALJ erred in finding that Shamrock’s rules concerning “Blogging” violate Section 8(a)(1). (*Id.* at p. 51, line 26 through p. 54, line 30; *see also* p. 60, line 43 through p. 61, line 17; p. 65, lines 24-35; p. 66, lines 1-5).

158. The ALJ erred in holding that the Shamrock rule entitled “Reporting Violations” is a violation of Section 8(a)(1). (*Id.* at p. 55, lines 19-41; *see also* p. 61, lines 19-21; p. 64, lines 4-5, 11-12; p. 65, lines 37-39; p. 66, lines 1-5).

159. The ALJ erred in holding that paragraph 6 under Shamrock’s “Guidelines to Appropriate Conduct” is a violation of Section 8(a)(1). (*Id.* at p. 56, lines 20-24, 37-41; *see also* p. 61, lines 23-25; p. 64, lines 11-12; p. 65, lines 41-43; p. 66, lines 1-5).

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<sup>9</sup> The ALJ ultimately concluded that the General Counsel failed to establish a Section 8(a)(1) violation in regard to this allegation. Accordingly, this exception is asserted only for protective purposes in the event that the General Counsel excepts to the ALJ’s dismissal of this allegation. If the General Counsel does not except to the dismissal, this exception will be withdrawn.

160. The ALJ erred in ignoring the provisions of Shamrock's rules that specifically assured employees that the rules would not be applied to restrict rights under Section 7 of the National Labor Relations Act. (*Id.* at p. 54, lines 24-27; p. 57, lines 2-5).

161. The ALJ erred in holding that the first and second paragraphs of Shamrock's rule entitled "No Solicitation, No Distribution" violate Section 8(a)(1). (*Id.* at p. 57, lines 39-43; *see also* p. 61, lines 27-29; p. 64, lines 11-12; p. 65, lines 45-47; p. 66, lines 1-5).

162. The ALJ erred in imposing a remedy in light of the General Counsel's failure to establish any violation of the National Labor Relations Act. (*Id.* at p. 62, line 1 through p. 66 line 30; Appendix).

163. The portion of the ALJ's proposed order that would require Shamrock to reinstate Wallace should be rejected on the basis that Wallace has voluntarily waived reinstatement. (*Id.* at p. 62, lines 4-6; p. 64, lines 23-25).

164. The portion of the ALJ's proposed order that would require Shamrock to make Wallace whole for loss of earnings and other benefits should be rejected on the basis that Shamrock has already offered, and Wallace has accepted, a lump sum payment exceeding his loss of earnings and other benefits. (*Id.* at p. 62, lines 6-15; p. 64, lines 27-33).

165. The ALJ erred in proposing a remedy that would include a reading of the notice by Kent McClelland or Mark Engdahl, or by a Board agent in their presence. (*Id.* at p. 62, line 35 through p. 63, line 6; *see also* p. 66, lines 22-26).

166. The ALJ erred by including a provision in his proposed order that would require Shamrock to rescind the Separation Agreement offered to Thomas Wallace on April 6, in light of the fact that the Separation Agreement was rescinded by its own terms 21 days after it was presented to Wallace. (*Id.* at p. 65, lines 13-17).

167. The ALJ's proposed Notice is improper in light of the General Counsel's failure to establish any violation of the National Labor Relations Act. (*Id.*, Appendix).

168. The ALJ's proposed Notice is needlessly redundant.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 10th day of March, 2016, a true copy of the foregoing was filed electronically with the Executive Secretary. Copies were also sent by electronic mail to:

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